

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1443

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

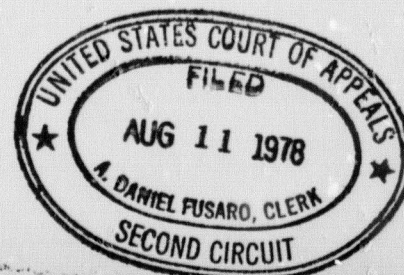
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UNITED STATES OF AMERICA, :
Appellee, : To be argued by
Rigdon H. Boykin
-against- :
Docket No. 77-1443
Dennis BENNETT, :
Defendant-Appellant. :
-----X
Docket No. 78-T8792

REPLY BRIEF FOR APPELLANT DENNIS BENNETT

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief of the United States filed herein. While the government has made many arguments in support of the judgments below, appellant rests on its initial brief with respect to them, except for the following government contentions:

1. The conspiracy did not end with the arrest of

Francisco Estrada Ponce ("Francisco").

2. The entrapment charge was proper and beneficial to appellant.

3. The mistatement of the date of aiding and abetting as being March 26 constitutes harmless error.

ARGUMENT IN REPLY

POINT I

THE CONSPIRACY WITH FRANCISCO ENDED ON MARCH 25
AND THE GOVERNMENT CASE AND EVIDENCE PRESENTED
WAS NOT DIRECTED TO A CONSPIRACY WITH OTHERS

The government argues that while a conspiracy with Francisco may have ended with his arrest and agreement to act as an agent on March 25, 1977 Dennis could still be conspiring with "others".

This argument is without merit. First, there is no evidence whatsoever in the trial record of a conspiracy with anyone other than Francisco. The Government in its brief, p. 23 states that there is some evidence of "other people" in that Bennett stated to Francisco on March 26th that "he had 'some people' to whom he intended to supply the heroin which Estrada-Ponce had just brought him." Unfortunately, the "some people" was placed out of context. The actual conversation reads as follows:

BENNETT: Pure stuff eh, how much is a kilo?

FRANCISCO: I don't know...should take three (inaudible)*

BENNETT: Inaudible...the cut too, eh, you know

FRANCISCO: Inaudible...the cut...

BENNETT: O.K. good let me get the case test. I'm going to take it to some people.

*The government also ignored this passage in its argument that Bennett was the first to mention the price of 33. (Gov't. brief p. 35). Here Bennett has asked the price and Francisco is telling it to him. Bennett then finds out if the cutting material is included in the price.

FRANCISCO: Money, you give me money, a little money for me?

BENNETT: No I don't have no money Frankie.

FRANCISCO: Oh my God, I've run out of money, you know, have no money here.

BENNETT: Well I'm going to try and get you some. I'll see if I can sell some of this tonight.

The entire evidence deals with Francisco and Bennett. As far as the jury is concerned that is the case. They are not told any conspiracy with Francisco ended with Francisco's arrest and conversion to a government agent. Similarly they are not told that any conspiracy after Francisco's arrest is with "other people", not Francisco.

Second, the government ignores the fact that with the arrest of Francisco, the object of the conspiracy - the one kilogram of heroin is in the possession of the government. The object of the conspiracy is impossible to attain. Thus there is no longer a conspiracy here any more than there can be a conspiracy to murder a person who is already dead or a conspiracy to rob a wooden dummy which the conspirators believe to be alive. Ventimiglia v. United States, 242 F.2d 620, 625-6. (4th Cir. 1957); see also Woo Wai v. United States, 223 F. 412 (9th Cir. 1915); but see, Beddow v. United States, 70 F. 2d 674 (4th Cir. 1934)*

*The Ventimiglia analysis would enable one to distinguish Beddow in that it essentially deals with a conspiracy that failed because improper endorsements were forged on some bonds. If the conspirators had forged the appropriate endorsements the conspiracy could have succeeded.

In Ventimiglia, the Fourth Circuit held that there could be no conspiracy by an employer to bribe an employees' "representative" under the Taft-Hartly Act because the "representative" in that case was not a representative under the Act. The Court also stated that the conspiracy would not be illegal even if the employer mistakenly believed that the representative was the type envisioned by the act.* Similarly, here Bennett could not have conspired with Francisco, as Francisco was incapable of engaging in such a conspiracy and the heroin has been seized.

Third, the chain conspiracy is broken with the arrest of Francisco and the seizure of the heroin. Even though there is no substantial evidence of anybody being in the chain other than Francisco and Bennett, assuming, arguendo that there was evidence of other levels in the chain at that point of time (e.g. Dennis has buyers with whom he has had a course of dealing) such evidence is of no support in this case. The Trial Court defined a chain conspiracy as one in which "the success of the conspiracy depended on the success of each operation along the chain, and that the success of the conspiracy depended on his performing his duty, successfully".** With the arrest of Francisco, and the seizure of the heroin, the chain was broken. Therefore the conspiracy must have ended in that point in time.

*Congress later amended the Taft-Hartley Act to the end that the definition of representative would cover the type of representative found in Ventimiglia, Costello v. Lipsitz 547 F.2d 1267, 1272, fn21 (4th Cir. 1977).

**App. p. 31

POINT II

THE ENTRAPMENT CHARGE WAS NOT BENEFICIAL TO BENNETT

The government, while in effect conceding that entrapment is no defense to the charge of conspiracy or aiding and abetting* states that a charge on entrapment is not error in that it tended to help Bennett by directing "the jury's attention to defense allegations that Bennett was ignorant of the heroin conspiracy prior to March 26". (Gov't. brief p. 29). This is essentially a harmless error argument which falls short of the mark.

Assuming arguendo that it in part directs the jury's attention to events prior to Francisco's arrest, it also invites the jury to scrutinize the events during the controlled delivery on March 26 very closely to see if Bennett was in fact entrapped on that date. The presumption being, obviously, that if he was not entrapped then he was guilty. This misleading confusing result is plain error. See Mills v. United States, 164 U.S. 644, 17 S. Ct. 210, 41 L. Ed. 584 (1897); and Nicola v. United States 72 F.2d 780, (3rd Cir. 1937), which contain discussions concerning two instructions given a jury, one correct and one

*In a half hearted attempt to imply that entrapment was a defense, the government states:

"While there was a discussion at trial of the legal impossibility of a charge of at-tempted possession with intent to distribute, based solely on the March 26 meeting (tr. 245-246), there is nothing in the record to indicate that it was legally impossible for Bennett to act in furtherance of the conspiracy on March 26." (Gov't. brief p. 29).

Surely the government is not now saying that Bennett entered the conspiracy alleged herein on March 26, 1977. If the government's case is that Bennett entered the conspiracy prior to Francisco's arrest on March 25, entrapment on March 26 with respect to this count cannot be a defense.

erroneous, is certainly analogous to this situation.*

In effect, the government ignores the fact that under the charge given, the jury was not called upon to focus on the timing of events. It could find that while Bennett did not know of the heroin prior to March 26, upon being presented with the opportunity to buy some at a great price** he was ready and willing to sell it for Francisco and was not entrapped. Thus under the charge given, the jury could have found Bennett guilty of aiding and abetting and conspiracy on March 26, even though he did not know Francisco had heroin or was bringing heroin to New York prior to Francisco's arrest. Bennett could not at law have properly been convicted of such offenses.

*In Mills the Supreme Court in part stated:

"Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine; and, as one of them was erroneous...the judgment... must be reversed" (164 US at 649).

In Nicola, the Third Circuit in a similar fashion stated:

"When two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error." (72 F.2d at 787).

**Sharkey testified that a kilo of heroin had a market price of: "the bottom line would be about thirty five thousand dollars and it could go anywhere to about fifty to fifty four thousand per kilo. "(App. p. 102). The price quoted by Francisco for over a kilo was \$33,000.

POINT III

THE JURY CHARGE, PRESENTATION OF THE CASE AND ARGUMENTS OF COUNSEL HAVE LEAD THE JURY INTO CONVICTING BENNETT OF CRIMES WHICH HE COULD NOT AT LAW COMMIT

The government concedes that the use of the date March 26 in the jury charge as the date of Francisco's possession of hereoin and Bennett's aiding and abetting was error. However the Government argues that it was harmless error. This argument is without merit.

The totality of the charges, the evidence and the jury arguments, taken as a whole and not out of context, clearly indicate to the jury that Bennett could have been held guilty of conspiring with Francisco and aiding and abetting Francisco on March 26. For example, the entrapment charge is not related to illegal acts prior to March 26; therefore it focuses the jury's attention on March 26 to see what crime Bennett may have been entrapped into committing on that date. The majority of evidence of any significance deals with the events which occurred on March 26 during the controlled delivery.

This is not a case of a mere erroneous citation of a date. This is a case where the charges and arguments to the jury enable the jury to convict Bennett of a "crime" of conspiracy and aiding and abetting in a different time and place than that which is at law possible under the circumstances of this case. Certainly it would have been a great deal more dif-

difficult to convict Bennett of conspiracy and aiding and abetting prior to March 25. Under the arguments and charges given it is impossible to determine whether Bennett was found guilty by the jury because they felt he was involved in a conspiracy with Francisco and aided and abetted Francisco prior to March 25 or because they felt while he may not have aided and abetted and conspired prior to March 25 he certainly did aid and abet and conspire with Francisco during the controlled delivery on March 26. It is submitted this constitutes error within the holding of Mills v. United States, supra, 164 U.S. at 649; also Nicola v. United States, supra, 72 F.2d at 787.

The government states that there is some leeway in the charge in that it states "on or about" March 26th--this is a patently weak argument and ignores the point that the charge also did not state that Francisco was a government agent on March 26 and that Bennett could not conspire with or aid and abet Francisco on that date. If these charges had been given it is very possible the jury would have not convicted Bennett as there is little or no evidence of Bennett's conspiring with or aiding and abetting anyone else on March 26. Due to the charges, the argument and evidence presented it is clearly most likely that the jury believed Bennett was conspiring with Francisco and aided and abetted Francisco on March 26.

CONCLUSION

For the reason stated hereinabove and in the brief on behalf of Dennis Bennett, it is respectfully submitted that the Judgment of Conviction and the order denying the \$2255 petition should be reversed.

Respectfully submitted,

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